No. 14-613

In The
Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN,
Postmaster General, United States Postal Service,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

ROBERTA L. STEELE
National Employment Lawyers Association
2201 Broadway, Suite 402
Oakland, CA 94610
(415) 296-7629
rsteele@nelahq.org

ERIC SCHNAPPER
Counsel of Record
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.[1]

SUMMARY OF ARGUMENT

The court of appeals acknowledged that a resignation by the plaintiff is an element of a constructive discharge claim. That is largely dispositive of the

[1] Counsel for petitioner and respondent have consented to the filing of this brief. Copies of their letters of consent are being filed with the Court. Neither party authored the brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief.

issue before the Court. Absent unusual circumstances, the limitations period for a claim does not begin to run until all the elements of the claim exist. There is no persuasive reason for departing in this case from that normal rule.

There are a number of important circuit conflicts regarding the other elements of a constructive discharge claim. The courts of appeals disagree about whether in such a case the plaintiff must prove that the employer intended to force the worker to resign. Those courts differ as well regarding whether a plaintiff is required, prior to resigning, to complain to some higher company official – other than that particular official who violated Title VII – about the violation triggering his or her resignation.

Those issues, however, are not presented by this appeal. The Court in resolving the instant case should avoid language which the lower courts might misunderstand as addressing either of those circuit conflicts.

ARGUMENT

I. THE LIMITATIONS PERIOD FOR A CONSTRUCTIVE DISCHARGE CLAIM DOES NOT BEGIN TO RUN UNTIL THE WORKER RESIGNS

The court of appeals erred in holding that the statute of limitations for a constructive discharge action begins to run, and can even expire, before the

worker has resigned. *See Mac's Shell Service, Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 184 (2010) ("To recover for constructive discharge, however, an employee generally is required to quit his or her job."). The court below correctly acknowledged that a worker's resignation is an element of a constructive discharge claim. Pet.App. 22a. As petitioner explains, under ordinary circumstances a limitations period for a cause of action does not begin to run until all elements of that claim exist. Pet.Br. 14-17 Nothing about the statute or regulation at issue in this case warrants a departure from that general rule.

Interpreting Title VII and the applicable regulation in this manner is strongly supported by the very nature of a constructive discharge claim. The touchstone of such a claim is the manner in which a reasonable person in the circumstances of the plaintiff would respond to the employer's unlawful actions. An employee who resigned was constructively discharged if a reasonable person would quit.[2] The governing limitations standard should be consistent with the expectations of a reasonable employee. Most workers would think that the time to complain about being forced to resign is after they have actually resigned, not weeks or months earlier when they are trying to decide whether or not to do so. The standard adopted

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[2] Reasonable workers might, of course, respond differently to the same unlawful actions; some workers may be so fiercely determined that they will put up with treatment that would cause most other employees to resign.

by the Tenth Circuit is one which, even if endorsed by this Court, will necessarily remain unknown to employees, who at the charge-filing stage will almost never be represented by counsel. Such an early limitations period will not shape the actions of uninformed claimants – although it might of course affect the tactics used by employers. Particularly in this context, plaintiffs should not be penalized for acting in the manner that would be typical of a reasonable person in their circumstances.[3]

II. THE COURT SHOULD NOT RESOLVE THE CIRCUIT CONFLICT REGARDING WHETHER IN A CONSTRUCTIVE DISCHARGE CASE THE PLAINTIFF MUST PROVE THAT THE EMPLOYER INTENDED TO FORCE THE WORKER TO RESIGN

There is a longstanding circuit conflict regarding whether the plaintiff in a constructive discharge case must prove that the employer specifically intended its

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[3] *See Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402-03 (2008):

> In the administrative context...it appears pro se filings are the rule, not the exception. The ADEA, like Title VII, sets up a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1998)....The systems must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes.

discriminatory or retaliatory actions to force the worker to resign. The court of appeals below described constructive discharge claims in terms that implied that such claims are recognized to prevent, and thus might be limited to, instances in which an employer seeks to force a worker to resign in order to evade the prohibition against unlawful dismissals.[4] This Court should avoid such characterizations, and leave this issue for resolution in another case.

1. The First, Third, Fifth, Ninth, Tenth, Eleventh and District of Columbia Circuits reject this specific intent requirement.

The First Circuit rejected the requirement in *Ramos v. Davis & Geck,* 167 F.3d 759, 732 (1st Cir. 1999). "[Defendant] argues that the imposition of objectively oppressive work conditions should not suffice to establish a constructive discharge without proof that the employer created the intolerable work conditions with the specific intent of forcing the employee to resign. Such a requirement of proof of employer intent would plainly be at odds with our settled precedent...." *Ramos* explained that this intent

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[4] "But employers should not be able to escape...remedies [for discriminatory dismissal] simply by making the job so intolerable that the employee resigns, making it unnecessary to fire him. *See* 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012) ('An employer...should not be able to accomplish indirectly what the law prohibits being done directly.'). To deal with that circumstance, various tribunals have embraced the concept of constructive discharge." Pet.App. 16a-17a.

requirement had originally been disapproved in *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559 (1st Cir. 1986). "The test is whether '*a reasonable person* in the employee's shoes would have felt compelled to resign,' *Calhoun*, 798 F.2d at 561 (emphasis added), irrespective of employer intent." *Ramos*, 167 F.3d at 732 (footnote omitted). Then-Judge Breyer joined the decision in *Calhoun*. *Ramos* recognized that the courts of appeals are divided about this issue. "Most circuits employ an objective standard for constructive discharge....A minority requires proof of the employer's subjective intent to establish constructive discharge." *Id.* at 732 n.4.

The Third Circuit long ago held "that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine." *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984).[5] *Goss* acknowledged that "there is a divergence of opinion as to whether...to...require[ ] a finding that the discrimination complained of amounted to an

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[5] *See Suders v. Easton*, 325 F.3d 432, 444 (3d Cir. 2003) (quoting *Goss*), *vacated on other grounds sub nom. Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); *Levendos v. Stern Entertainment, Inc.*, 909 F.3d 747, 753 (3d Cir. 1990) (quoting *Goss*); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230 (3d Cir. 1988) (quoting *Goss*).

intentional course of conduct calculated to force the victim's resignation." 747 F.2d at 887 [6]

One of the earliest decisions rejecting the special intent requirement is in the Fifth Circuit.

> Defendant urges, with some supporting authority, that in order to constitute a constructive discharge, the imposition of intolerable working conditions must be with the purpose of forcing the employee to resign....[S]uch a rule is inconsistent with authority in this Circuit and, we believe, with the realities of modern employment.

Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). That circuit in subsequent cases has consistently rejected that special intent standard.[7]

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[6] *Levendos* recognized that "at least two...different legal standards have emerged....Some courts have adopted a test based on an inquiry into the motive of the employer, holding, for example, that 'the employer's actions must have been taken with the intention of forcing the employee to quit.' *Johnson v. Bunny Bread, Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)....Other courts, such as ours, have adopted a reasonable person test, which is focused on the impact of an employer's actions, whether deliberate or not, upon a 'reasonable' employee." 860 F.2d at 1230.

[7] *See Vallecillo v. U.S. Dep't of Housing and Urban Dev.*, 154 Fed.Appx. 764, 768 (5th Cir. 2005) ("proof that the employer imposed the intolerable conditions with the specific intent to force the employee is not required"); *Lamb v. City of Sweetwater Housing Authority*, 1993 WL 3471999 at *6 (5th Cir. Aug. 19, 1993); *Schwago v. Spradlin*, 701 F.2d 470, 481 n.12 (5th Cir. 1983) ("the employee need *not* prove it was the employer's purpose to force the employee to resign, but rather only that the employer made conditions intolerable") (emphasis in original);

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The Fifth Circuit has repeatedly acknowledged that other courts of appeals do apply that standard. "[S]ome other circuits have endorsed such a strict standard." *Boze v. Branstetter,* 912 F.2d 801, 804 (4th Cir. 1990). The Eleventh Circuit, which follows Fifth Circuit precedents established prior to the creation of the Eleventh Circuit, applies the rule in *Bourque. See Alliance Metals, Inc. v. Hinely Industries, Inc.,* 222 F.3d 895, 902-03 (11th Cir. 2000).

In *Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982), in an opinion joined by then-Judge Kennedy, the Ninth Circuit adopted the Fifth Circuit rule in *Bourque,* "reject[ing] arguments that an employee has to prove it was the employer's intent to force the employee to resign." 686 F.3d at 813. "In *Nolan*...we adopted the Fifth Circuit's formulation of constructive discharge [as] later clarified in *Bourque*...." *Lojek v. Thomas,* 716 F.2d 675, 681 (9th Cir. 1983). "The test establishes an objective standard: the plaintiff need not show that the employer subjectively intended to force the employee to resign. *See...Nolan*, 686 F.2d at 814 n.17." *Watson v. Nationwide Ins. Co.,* 823 F.2d 360, 361 (9th Cir. 1987). *Satterwhite v. Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984), rejected decisions

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Junior v. Texaco, Inc., 688 F.2d 377, 379 (5th Cir. 1982) ("it is not necessary to show that the employer subjectively intended to force a resignation"); *Pittman v. Hattiesburg Municipal Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981) ("[t]he employee...does not have to prove it was the employer's purpose to force the employee to resign").

from another circuit that "use language that focuses on the employer's subjective intent, rather than on the reasonable employee's perspective....This view is out of step with both the weight of authority and the law of our Circuit. *See Nolan*, 686 F.2d at 814 n.17." *Poland v. Chertoff*, 494 F.3d 1174, 1184 n.7 (9th Cir. 2007), noted that the requirement had also been rejected by the First, Third, Fifth and Tenth Circuits, but was applied by the Fourth, Sixth and Eighth Circuits.

The Tenth Circuit also rejects any requirement of proof that an employer intended to force a worker to resign, expressly noting the circuit conflict on that issue.

> There is...a divergence of opinion among the circuits as to the findings necessary to apply the [constructive discharge] doctrine. While some courts required the employee to prove the employer's specific intent to force him to leave, *Bristow v. Daily Press, Inc.*,..., others have adopted a less stringent objective standard requiring the employee to prove that the employer has made working conditions so difficult that a reasonable person in the employee's shoes would feel forced to resign. *Goss v. Exxon Office Systems Co*....In...our most recent pronouncement in this area, we... adopt[ed] the standard set out in [the Fifth Circuit decision in] *Bourque*...."[A]n employer's subjective intent is irrelevant...."

Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44 (10th Cir. 1986) (quoting *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981)).[8]

In the District of Columbia Circuit, *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981), held that in a constructive discharge case "an employer's subjective intent is irrelevant...." In *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds sub nom. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the District of Columbia Circuit overturned a district court opinion that had required proof an employer subjectively intended to force a worker to resign. 825 F.2d at 427 (citing *Bourque* and *Goss*). *Simpson v. Federal Mine Safety and Health Review Commission*, 842 F.2d 453, 462 (D.C. Cir. 1988), in an opinion for the court by then-Judge Ginsburg, stated that "*Clark*...rejected a motivation test...." *Simpson* noted that "the predominan[t]... standard" disapproves such a requirement, citing decisions in the First, Second, Third, Fifth, Ninth and Tenth Circuits. 842 F.3d at 462 n.8. Then-Judge Ginsburg noted, however, the existence of

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[8] The Tenth Circuit has consistently applied that rule for more than three decades. *E.g.*, *Jeffries v. Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998) ("the employer's subjective intent...[is] irrelevant"); *Tran v. Trustees of the State Colleges of Colorado*, 355 F.3d 1263, 1270 (10th Cir. 2004) ("we apply an objective test under which neither the employee's subjective views of the situation, nor her employer's subjective intent with regard to discharging her, are relevant"); *Keller v. Crown Cork & Seal USA, Inc.*, 491 Fed.Appx. 908, 915 (10th Cir. 2012) (quoting *Tran*).

the contrary rule in several "federal circuits in which the subjective constructive discharge analysis persist[s]," 842 F.3d at 462 and n.8, citing decisions in the Sixth and Eighth Circuits.

2. The Fourth, Sixth and Eighth Circuits hold that in a constructive discharge case the plaintiff must prove that the employer intended to force the worker to resign.

Eighth Circuit precedent requires that, "[t]o prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010). That Eighth Circuit requirement derives from that Circuit's key holding in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981), that "[t]o constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." The Eighth Circuit has repeatedly applied that specific intent requirement over the decades since *Bunny Bread*.[9]

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[9] *E.g.*, *Hervey v. City of Little Rock*, 787 F.2d 1223, 1331 (8th Cir. 1986); *Smith v. Goodyear Tire & Rubber Co.*, 895 F.2d 467, 472 (8th Cir. 1990); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992); *Spears v. Missouri Dept. of Corrections and Human Resources*, 210 F.3d 850, 854 (8th Cir. 2000); *Meyers v. Nebraska Health and Human Services*, 324 F.3d 655, 660 (8th Cir. 2003); *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1031 (8th Cir. 2002); *Cole v. May Dept. Stores Co.*, 109 Fed.Appx. 839,

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For more than thirty years, the Fourth Circuit has also required a plaintiff in a constructive discharge case to show the actions complained of "were intended by the employer as an effort to force the employee to quit." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984). The Fourth Circuit applied the standard most recently in *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 425 (4th Cir. 2014).[10]

841-42 (8th Cir. 2004) ("[t]o prevail on her constructive discharge claim, Cole had to show that May deliberately created intolerable working conditions with the intention of forcing her to quit...."); *Tatum v. City of Berkeley*, 408 F.3d 543, 552 (8th Cir. 2005) (plaintiff required to adduce evidence that the City took action "with the intent to create an intolerable working environment, in order to compel [plaintiff] to resign"); *EEOC v. City of Independence*, 471 F.3d 891, 896 (8th Cir. 2006) ("'The employer's actions must have been intended to force the employee to quit.'") (quoting *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000)); *Elnashar v. Speedway Superamerica, LLC*, 484 F.3d 1046, 1058 (8th Cir. 2007) ("[c]onstructive discharge occurs when an employer deliberately creates 'intolerable working conditions with the intention of forcing the employee to quit'") (quoting *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999)); *Devin v. Schwan's Home Service, Inc.*, 491 F.3d 778, 790 (8th Cir. 2007) (plaintiff must show that "her employer intended to force her to quit"); *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 534 (8th Cir. 2008) ("Anda's constructive discharge claim fails because Anda provided no evidence that Wickes intended to force Anda to quit."); *Wilkie v. Dept. of Health and Human Servs.*, 638 F.3d 944, 954 (8th Cir. 2011) (quoting *Anda*); *Aubucon v. Geithner*, 734 F.3d 638, 645 (8th Cir. 2014) (quoting *Sanders v. Lee Cnty. Sch. Dist.*, 669 F.3d 888, 893 (8th Cir. 2012)).

[10] *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 186-97 (4th Cir. 2004); *Matvia v. Bald Head Island Mgmt., Inc.*,

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The Fourth Circuit candidly acknowledged that most circuits have rejected this requirement:

> The circuits are divided as to what a plaintiff must show....The majority of the circuits...rely on an objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. The minority view, to which we subscribe, is that a plaintiff must also prove that "the actions complained of were intended by the employer as an effort to force the employee to quit."

Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting)). Justice O'Connor, sitting on a case in the Fourth Circuit, was constrained to apply that minority standard in her opinion for the court in *Lauture v. Saint Agnes Hospital*, 429 Fed.Appx. 300, 307 (4th Cir. 2011).

Since 1999 the Sixth Circuit rule has been that a constructive discharge claim requires proof that the employer acted "with the intention of forcing the employee to quit." *Moore v. Kuka Welding Systems*, 171 F.3d 1073, 1080 (6th Cir. 1999).[11]

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259 F.3d 261, 272 (4th Cir. 2001); *Taylor v. Virginia Union University*, 193 F.3d 219, 237 (4th Cir. 1999) (en banc) ("Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit.").

[11] *See Goldfaden v. Wyeth Laboratories, Inc.*, 482 Fed.Appx. 44, 48 (6th Cir. 2012); *Savage v. Gee*, 665 F.3d 732, 739 (6th Cir.

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3. The existence of this circuit split has been acknowledged by the First, Third, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits. The United States noted in its brief in *Pennsylvania State Police v. Suders,* 542 U.S. 129, 141 (2004), that "[t]he courts of appeals are divided on whether an employee must make an additional showing that the employer intended to cause the employee to resign." Brief for the United States as Amicus Curiae, 14. The EEOC recognizes the existence of this circuit split. *Taylor v. Cheney,* 1990 WL 1112830 (Office of Fed. Ops.) (contrasting "majority view" and "minority viewpoint"; citing Eighth Circuit precedent). In *Suders* Justice Thomas observed that "a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement." *Suders*, 542 U.S. at 152 (Thomas, J., dissenting). Several state courts have also recognized the division among the federal appellate courts.[12] Commentators have repeatedly described this circuit conflict.[13]

2012); *Ejikeme v. Violet,* 307 Fed.Appx. 944, 950 (6th Cir. 2009); *Tepper v. Potter,* 505 F.3d 508, 514-15 (6th Cir. 2007); *Johnson v. Rumsfeld,* 238 Fed.Appx. 105, 109 (6th Cir. 2007); *Watson v. City of Cleveland,* 220 Fed.Appx. 844, 856 (6th Cir. 2006); *Logan v. Denny's, Inc.,* 259 F.3d 558, 568-69 (6th Cir. 2001).

[12] *Pribil v. Archdiocese of St. Paul and Minneapolis,* 533 N.W.2d 410, 413 (Ct.App.Minn. 1995); *Brady v. Elixir Industries,* 196 Cal. App. 3d 1299, 1305 (4th Dist. 1987); *Lewis v. Oregon Beauty Supply Co.,* 714 P.2d 618, 621 (Or.App. 1986).

[13] "Most circuits...do not require the plaintiff to show [that] the employer specifically intended to force her to quit...[but] a minority of circuits...require that the plaintiff show that the

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4. The requirement that a plaintiff prove the employer acted with a specific intent to force his or her resignation is inconsistent with the text of Title VII and with this Court's decision in *Suders*.[14] That issue,

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employer subjectively intended to force [the plaintiff] to quit." Cathy Shuck, Comment, *"That's It, I Quit" Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J.Emp.&Lab.L. 401, 413, 415 (2002); *see* Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U.Chi.L.Rev. 561, 562 (1986) ("The circuit courts split over whether (and to what degree) specific employer intent is a required element of constructive discharge[.] Most circuits...do not require the plaintiff to show the employer specifically intended to force her to quit....Under the minority view, the plaintiff must show not only that conditions were intolerable, but also that the employer created those conditions with the specific intent of forcing her to resign.") (emphasis and capitalization omitted).

[14] In *Suders*, this Court set out a single, straightforward standard for determining when discrimination (or retaliation) would give rise to a constructive discharge claim. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" 542 U.S. at 141. The *Suders* standard is expressly "objective"; neither the subjective state of mind of the employee nor that of the employer (other than an intent to discriminate or retaliate) is relevant.

The specific intent requirement utilized by the Fourth, Sixth and Eighth Circuits engrafts onto Title VII an additional motivation element that goes beyond the very specific language of the statute. The general anti-discrimination in section 703(a) forbids without limitations actions taken "because of such individual's...sex." 42 U.S.C. § 2000e-2(a)(1). Similarly, section 701 provides that the discrimination forbidden by Title VII includes adverse action taken "because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e. An adverse action taken for any of these forbidden purposes is unlawful, regardless of what consequences the

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of course, is not before the Court. But some lower court opinions analyzing the limitations question presented by this case have characterized constructive discharge claims in terms which imply or assume that such intent is required. We urge this Court to avoid such characterizations.

III. THE COURT SHOULD NOT RESOLVE THE CIRCUIT CONFLICT REGARDING WHETHER IN A CONSTRUCTIVE DISCHARGE CASE THE WORKER MUST COMPLAIN TO HIGHER MANAGEMENT PRIOR TO RESIGNING

The circuit courts are divided about whether in a constructive discharge case the employee is required, prior to resigning, to go over the head of the company official who has engaged in unlawful discrimination or retaliation, and complain to someone else.[15] "[W]hether the employee's duty to report ought

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discriminatory employer might have hoped would ensue. Section 1981a establishes an additional mental state requirement for punitive damages, requiring proof that an employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Even punitive damages can be awarded without the need for proof that an employer intended any specific harm, or any harm at all.

[15] Employers ordinarily are strictly liable for unlawful discrimination or retaliation by their agents. In certain instances of sexual or racial harassment, an employer might be able to avoid liability by showing, inter alia, that the victim unreasonably failed to invoke the employer's own corrective mechanisms. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). But that

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to be extended to cover cases of constructive discharge is the most critical policy question that the courts must confront...[T]he current debate over the proper classification of constructive discharge masks an important difference of opinion over the legal significance of a plaintiff's use of, or failure to use, an employer's internal grievance procedure." Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge,* 77 S.Cal.L.Rev. 307, 373 (2004).

The court of appeals below described constructive discharge claims in terms that suggest that workers are required to complain to higher management.[16] This Court should avoid such characterizations, and should leave this issue for resolution in another case.

1. Several circuits have rejected this requirement. In the Third Circuit, whether a worker complained to other officials is just one of several factors that bear on whether a reasonable person would have resigned when the plaintiff did. The Third Circuit

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rule does not apply to non-harassment cases, or to harassment cases in which the harassment culminated in a tangible employment action, in which the harasser was an alter-ego of the company, in which the harasser expressly relied on his supervisory authority, in which the employer lacked a sufficient practice to prevent and correct harassment, or in which some other employee had complained about the harasser. *Id.*

[16] "[S]ociety and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." Pet.App. 21a (quoting *Derr,* 796 F.2d at 342).

subsequently reiterated that there is no "*quasi* exhaustion requirement" that plaintiffs in constructive discharge cases must file some sort of internal complaint or protest before resigning. *Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2003), *vacated on other grounds sub nom. Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Whether a worker first pursued such an internal complaint is only

> another important consideration...that relates to the inquiry of whether a reasonable person would have felt compelled to resign....[I]t is relevant to a claim of constructive discharge whether a plaintiff explored alternative avenues to resolve the alleged discrimination, but the plaintiff's actions must be considered in light of the totality of circumstances. *Clowes* [*v. Allegheny Valley Hospital*, 991 F.2d 1159, 1162 n.6 (3d Cir. 1993)] simply recognizes that, in many cases, a reasonable person will not react to minor harassment or workplace disturbances by heading straight for the exit and that, in others, the harassment or discrimination may be so severe that any reasonable person would feel compelled to walk out immediately....[A] failure to [explore alternative avenues] will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign.

325 F.3d at 445-46. "We do not require that such steps be taken in all cases. An employee may be able to

show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the period necessary to take those steps." *Clowes* (opinion by Alito, J.).

Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) rejected this type of exhaustion requirement. In *Young*, the plaintiff was told by the manager of the office where she worked that she was required to attend morning meetings that were commenced with a prayer and religious talk by a local minister, despite her religious objections. She resigned the same day without attempting to complain about that directive to higher ranking officials. 509 F.3d at 142. The court rejected defendant's argument that it was not liable because "the manner of Mrs. Young's leaving was so precipitous as to give Southwestern no opportunity to accommodate her beliefs....Southwestern urges that if only plaintiff had contacted a high-ranking officer before leaving, the entire matter would have been quickly resolved in a mutually agreeable fashion." 509 F.2d at 144-45. The majority also rejected the suggestion of a dissenter that it allow "an employee to claim constructive discharge only after requesting an authoritative ruling from the company management [in order to] encourage private settlement of employment disputes." 509 F.2d at 146 (Thornberry, J., dissenting).

The Seventh Circuit takes a quite different approach. In that circuit there is no requirement that workers utilize internal complaint processes in every constructive discharge case; rather, a failure to

complain may be evidence that the discriminatory conditions were not that serious.

> In some situations, the standard of reasonableness will require the employee who wants to make a successful claim of constructive discharge to do something before walking off the job. The reason is not that there is a doctrine of exhaustion of remedies....The reason, rather, is that passivity in the face of working conditions alleged to be intolerable is often inconsistent with the allegation....The significance of passivity is thus evidentiary.

Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998). Here, as in the Third but not the Eighth Circuit, a jury would assess the significance of a failure to complain, weighing it against other evidence. But the absence of a complaint is relevant in the Seventh Circuit for a reason and in a way entirely different than in the Third or Eighth Circuit. The failure to complain, if coupled with a delay in resigning, would in the Seventh Circuit be evidence that the working conditions were not really all that bad; but if the worker resigned promptly, the failure to complain would not affect a plaintiff's claim.

2. The Eighth Circuit has held repeatedly that the absence of a sufficient number of internal complaints bars a constructive discharge claim. The range of circumstances in which the Eighth Circuit has held that complaints are required demonstrate the exceptional consequences of such an internal

exhaustion requirement. The Eighth Circuit first applied its internal-complaint requirement in *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996). The plaintiff

> had made earlier complaints about Meyers' racially discriminatory scheduling practices to the...production manager and the assistant production superintendent....Tidwell and four other African-American [employees had earlier] filed a race discrimination charge against Meyer's with the Equal Employment Opportunity Commission, claiming that the...shift assignments were determined in a racially discriminatory manner.

93 F.3d at 493 n.4. When the company again gave a favored shift assignment to a less experienced white worker, Tidwell resigned. The Eighth Circuit dismissed his constructive discharge claim on the ground that – despite the prior complaints and EEOC charge – he had failed to "give [the employer] an opportunity to explain the situation or remedy it." 93 F.3d at 496.

Knowles v. Citicorp Mortgage, Inc., 142 F.3d 1082, 1086 (8th Cir. 1998), rejected the plaintiff's constructive discharge claim because "[a]lthough Knowles argued that he exhausted *all* avenues of relief in seeking a solution to his problems at Citicorp, the record reveals that, *aside from* discussing [his supervisor's biased] comments with [the supervisor's superior], he took few, if any, steps toward this end. Knowles neglected to so much as mention his

concerns to anyone in Citicorp's human resources department or to any of his co-workers. Furthermore, he made no attempt to utilize Citicorp's internal grievance procedures or even to inquire about the possibility of doing so." (Emphasis added). Similarly, in *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241 (8th Cir. 1998), the plaintiff had complained about retaliation both to the plant personnel representative and to a manager; the court of appeals dismissed her constructive discharge claim because she had failed to also pursue those allegations "up the chain of command to [the vice-president for human resources]." 141 F.3d at 1247

Repeated internal complaints were also deemed insufficient in *Tork v. St. Luke's Hospital*, 181 F.3d 918 (8th Cir. 1999).

> [The worker] attempted to protest the first [disputed action] by speaking with someone in the...human resources department, but was denied the opportunity to do so, and...intended to exercise her right to file a formal complaint with the employee assistance program, but was told by her supervisor that it was too late to do so. With respect to the second [disputed action]...she tried to speak to her supervisor about it, but was ignored.

181 F.3d at 919-20. The Eighth Circuit rejected the plaintiff's constructive discharge claim on the ground that she should have done even more. "Ms. Tork sought review beyond her direct supervisor...for only

one incident....She failed to seek review of her supervisor's action through either the human resources department or the employee assistance program...." 181 F.3d at 920. *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678 (8th Cir. 2001), held that it is not sufficient that a worker complained about a discriminatory practice to his or her supervisor; if the supervisor is unresponsive, the worker must then appeal that supervisor's decision to higher officials or forfeit his or her constructive discharge claim. In *Sowell*, the plaintiff had earlier complained about a discriminatory manager "to officials from [the company's] local and Colorado human resources offices." 251 F.3d at 681, and again complained to her direct supervisor when that official adopted a disputed policy. The court rejected her constructive discharge claim because she had not complained enough. "Sowell complained to [her supervisor] regarding the policy, but she took no *further* steps to exempt herself from its requirements, such as...approaching human resources about the policy itself...." 251 F.3d at 685 (emphasis added).

The Eighth Circuit has explained that this requirement is a judicially fashioned *per se* rule applying the holding in *Suders* that a constructive discharge claim requires proof that a reasonable person in the same circumstances would have resigned. "To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem." *Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1027 (8th Cir. 2001).

3. A requirement that a plaintiff complain to some other, higher official prior to resigning is inconsistent with the text of Title VII and with this Court's decision in *Suders*.[17] That issue, of course, is not

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[17] The requirement that a discrimination victim afford to a discriminatory employer a "reasonable opportunity" to correct its violation is, as the Third Circuit recognized, a judicially created exhaustion requirement. But the exhaustion requirements in Title VII itself are quite specific and limited, and the courts have no authority to require more than Congress saw fit to mandate. Under section 706(c), the entity to which a discrimination victim must complain is the EEOC or a state or local anti-discrimination agency, not to the victim's employer. 42 U.S.C. § 2000e-5(c). Congress contemplated that under the statutory exhaustion scheme, employers would learn of discrimination charges through the EEOC, which is directed to notify the employer within 10 days of the receipt of a charge. 42 U.S.C. § 2000e-5(b). The statutory deadline for complaints by private employees is 180 or 300 days, not prior to resigning. 42 U.S.C. § 2000e-5(c)(1). The Eighth Circuit may believe it would be better if employees complained to their employers directly, rather than through the EEOC, or if managers did not have to wait 180 to 310 days to learn about discriminatory practices by other company officials. But that is not the exhaustion scheme which Congress chose to enact.

This Court's decision in *Suders* explained that a worker could establish a constructive discharge by showing that a reasonable person would have resigned in response to the unlawful employer action at issue. The Eighth Circuit rule is based in part on the court's view that it would be *per se* unreasonable for an employee to resign without complaining up the chain of command. But this Court has made clear that the assessment of what a reasonable person would do is an issue for the trier of fact, not a question of law.

When the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.

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before the Court. But some lower court opinions analyzing the limitations question presented by this case have characterized constructive discharge claims in terms which imply or assume that workers are required to exhaust any employer-created channels for complaint. We urge this Court to avoid such characterizations.

See, e.g., United States v. Gaudin, 515 U.S. 506, 512 (1995) (recognizing that "'delicate assessments of the inferences a "reasonable [decisionmaker]" would draw...[are] peculiarly one[s] for the trier of fact....'" (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1946); first alteration in original)); *id.*, at 450, n.12 (observing that the jury has a "unique competence in applying the 'reasonable man' standard"); *Hamling v. United States*, 418 U.S. 87, 104-05 (1974) (emphasizing "the ability of the juror to ascertain the sense of the 'average person'" by drawing upon "his own knowledge of the views of the average person in the community or vicinage from which he comes" and his "knowledge of the propensities of a 'reasonable' person"); *Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L.Ed. 745 (1874) ("It is assumed that twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."). *See Hana Financial, Inc. v. Hana Bank*, 135 S.Ct. 907, 911 (2015) (because constructive discharge is a preeminent instance of the reasonable person standard under *Suders* it ought to be routinely a jury issue).

CONCLUSION

For the above reasons, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

ROBERTA L. STEELE
National Employment
Lawyers Association
2201 Broadway, Suite 402
Oakland, CA 94610
(415) 296-7629
rsteele@nelahq.org

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

Counsel for Amicus Curiae